United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR THE APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18367

HALCOTT A. BRADLEY,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Where the defendant on cross-examination was asked if he had ever struck his wife and answered that he had no recollection of having struck his wife (not the deceased) in the past, was it error for the Court to permit the prosecution, in "rebuttal," to elicit from the wife that some years prior to the alleged offense, the defendant had struck her and that defendant had been jealous and possessive? And was it particularly prejudicial where the jury was given the choice of finding the defendant guilty of a lesser degree of homicide?

2. Where there was no direct evidence of defendant's presence in the room with the deceased prior to deceased's death, was it error for the Court to admit statement of deceased, uttered behind a closed door, to the effect that defendant was then and there present and that he had a gun; and was it error to admit such statement as an excited or spontaneous utterance, where the Court did not conduct an inquiry as to the circumstances under which it was made?

3. During a protracted trial for a capital offense, was it error for the Court to have failed to admonish

the members of the jury each time they separated that they were not to discuss or read about the case, particularly where progress of the trial was reported in the press?

4. Was it error for the Court to permit the prosecutor to argue to the jury that he not only represented the people of the District of Columbia, but also the deceased?

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JURISDICTIONAL STATEMENT

The jurisdiction of the Court is based upon Title 28, § 1291 of the United States Code.

STATEMENT OF THE CASE

The appellant was arrested on February 16, 1963, on a charge of homicide and thereafter was indicted for first

degree murder (§ 22-2401, D. C. Code (1961 Ed.)). He was committed to St. Elizabeths Hospital for mental examination on March 28, 1963. He remained in St. Elizabeths Hospital until June 28, 1963, when he was certified competent. Appellant was tried and was convicted of second degree murder (§ 22-2403, D. C. Code (1961 Ed.)). He was thereafter sentenced to imprisonment for from 10 to 30 years, and he appeals.

To prove its case, the prosecution called Vermelle B. Whittaker, who testified that she saw the deceased leave the apartment house where she had an apartment about 10 a.m. on February 6, 1963, and return with two police officers who accompanied the deceased to the second floor apartment that the deceased had shared with the appellant, and that the police officers had accompanied the deceased downstairs a little while later, and appellant later came down the stairs carrying a suitcase and some books. (Tr. 117-120.)

Mrs. Edna L. Henderson testified that she had received a telephone call from the deceased on the morning of February 6, 1963, at about 10 a.m. and that, as a result of the telephone call, the witness called her husband to have him

contact Lewis Bellamy, the deceased's ex-husband, so that said ex-husband could telephone the deceased. (Tr. 291.)

The witness further testified that later that same day, as a result of that telephone call, the witness met the deceased at about 12:30 p.m. and took deceased to witness' own home (Tr. 292) and placed the deceased in witness' own bed to rest (Tr. 294) because deceased complained of a neck injury (Tr. 293); furthermore, the witness testified that the appellant telephoned the witness several times that day in order to find out where the deceased was, but that the witness refused to tell the appellant where the deceased was located (Tr. 295). After spending that night with the witness, the deceased left witness' home to go to work on February 7, 1963, and returned to witness' home some time before the witness (Tr. 295-296); the witness further stated that the appellant again contacted her that day (Tr. 296) to "have her [the deceased] tell the truth about something" (Tr. 297).

Mrs. Henderson went on to say that on February 9, 1963, deceased arrived at witness' home in the morning and that later they were joined by deceased's ex-husband and that subsequently, deceased, deceased's ex-husband, witness, and

witness' husband had lunch and that the group later went out to purchase a lock for deceased's apartment front door (Tr. 299); that they all then went to deceased's apartment; that they all left later that evening and that the deceased spent the night at the witness' home (Tr. 300); that on February 10, 1963, deceased's ex-husband arrived some time after witness had left home for church and witness' return about 2:00 p.m. (Tr. 301), and that ex-husband, accompanied by his brother left and later returned about 5:00 p.m. giving the deceased "a little small key" (Tr. 302).

Later that evening, deceased, deceased's ex-husband, witness, and witness' husband went to deceased's apartment where witness noticed that a chain lock, similar to the one purchased the day before, had been installed on deceased's front door (Tr. 302); later witness and her husband departed (Tr. 303), and deceased's ex-husband remained behind; however, the deceased spent the following night -- February 11 -- with the witness (Tr. 304), as well as the night of February 12. On February 13, the witness spoke to the deceased many times over the telephone (Tr. 305) and the deceased spent that evening with the witness (Tr. 306) as well as

the night of February 14 (Tr. 307). The witness was with the deceased until midnight on February 15 when deceased left her. (Tr. 308.) The witness continued that she had received a telephone call on February 16 at about 10:00 a.m. and that deceased went to witness' house accompanied by deceased's ex-husband and that they all then went downtown at about 11:00 a.m. (Tr. 311), where deceased's ex-husband left them, and deceased picked up her car "somewhere near the Corporation Counsel's Office" (Tr. 312-313); that deceased then drove witness home, leaving her there (Tr. 313), and later returning when witness and deceased drove downtown together and returned witness to her home at about 6:30 p.m., when the deceased drove off (Tr. 315) and shortly thereafter, the witness received a telephone call from the deceased's ex-husband (Tr. 316) and that shortly thereafter, witness left her house (Tr. 316-317).

Miss Karen Henderson, daughter of the previous witness, was allowed to testify over objection of counsel, that appellant had called asking for the previous witness shortly after said previous witness had left the house on February 16, 1963. (Tr. 343.)

Pvt. Hiram Kirby, of the Metropolitan Police Department, testified that he had answered a call to go to deceased's apartment on February 6, 1963 (Tr. 132)where he was met by deceased and her ex-husband (self-introduced) and that he also saw appellant dressed in pajamas on the third floor landing (Tr. 132) and talked to the appellant on the second floor (Tr. 133) and that he then asked the appellant to leave the apartment as the deceased requested (Tr. 136) and that before the appellant left the apartment, he turned back the rug and gave the deceased two keys denying that there were more (Tr. 137); that appellant had an argument with the deceased but that there was no argument between the deceased and her ex-husband at that time (Tr. 138) and that appellant was last seen by this witness standing in front of the apartment building with a couple of suitcases (Tr. 137).

Robert H. Campbell, Assistant Corporation Counsel for the District of Columbia (Tr. 144), testified that he received a phone call from the deceased on February 13, 1963, and that as a result of this conversation, he advised the deceased to come down to his office on the following day (Tr. 147) which the deceased did, and the witness thereupon

contacted the appellant, whom he had known in school and made an appointment for the next day. (Tr. 150.) However, on February 15, 1963, the appellant failed to appear, and the deceased applied for a warrant for the appellant's arrest. (Tr. 151-152.)

Pvt. George P. Day, Metropolitan Police Department, testified that on February 14, 1963, he went to (appellant's home) 3919 17th Street, N. E., Washington, D. C., to issue a summons to appellant (Tr. 155); that on questioning the person who answered the door at the above address -- whom he identified as the appellant (Tr. 160) -- he was told by that person that Mr. Bradley was downtown (Tr. 156); that the said person who answered the door said he was "Robert Smith" (Tr. 159) and that he could not accept the summons as he, the man who answered the door, was going out of town (Tr. 157). The witness returned that summons (Tr. 160) but returned to 3919 17th Street, N. E., Washington, D. C., on February 15, 1963, but again was unable to serve it and had to return it too (Tr. 161).

George V. Kissal, a driver for the Yellow Cab Company of Washington, testified that he had responded to a call

from 3919 or 3917 17th Street, N. E., Washington, D. C., on February 15, 1963, at about 1:00 or 1:20 p.m. for the appellant (Tr. 163-165) who gave him four addresses: 1608 Gale Street, N. E., 473 or 453 Florida Avenue, N. W., and 9th and U Streets, N. W. (Tr. 166); that at the Gale Street address, the appellant went up to the porch but was gone only a very short time; that the witness then drove the appellant to Florida Avenue (Tr. 166) and that the appellant left the Florida Avenue address carrying some envelopes, proceeded to a liquor store across the street from the Florida Avenue address and that he left the store carrying a bag, seemingly containing a bottle but was recalled to the store to retrieve the envelopes which he had left behind there and that they then drove to 9th and U Streets, N. W. (Tr. 168), where the appellant went into a novelty shop and after a short time there, the witness drove the appellant to 922 Madison Street, N. W. (Tr. 168), arriving about 2:30 p.m., where the appellant attempted to wrap the bag which had become torn, around the bottle (Tr. 169).

The appellant, the witness testified, told him that he, the appellant, was going to see a young lady for whom he had

just obtained a divorce, but that he, the appellant, was having trouble with her. (Tr. 180.) The appellant, the witness continued, was last seen entering 922 Madison Street, N. W. (Tr. 173.)

Mrs. Ann Wilson Burke, who lived in Apartment 104, 922 Madison Street, N. W., a street-facing apartment, testified that on the afternoon of February 15, 1963, she saw the appellant (Tr. 183) emerge from a Yellow Cab carrying a bottle and either limping very badly or drunk (Tr. 181) and that prior to that time she had seen the appellant several times with deceased (Tr. 184).

John Kirksey, janitor of 922 Madison Street, N. W., testified that on the afternoon of February 15, 1963, while mopping the hallways and stairs, he heard a noise and upon investigation found the appellant who told the witness that he, the appellant, was waiting for a man (Tr. 190-194) and that later a man did arrive who let the appellant into Apartment 202 (Tr. 194).

William Joseph Kasulaitis, a locksmith, testified that he went to 922 Madison Street, N. W., Washington, D. C., on February 15, 1963, in response to a call (Tr. 225) and

that upon his arrival there, Apartment 202 was pointed out to him by a man whom he identified as the appellant at about 2:30 p.m. (Tr. 226-227); that he, the witness, did not ask the appellant for any identification other than keys which the appellant told him that his, the appellant's, wife must have them (Tr. 228).

The witness further testified that the chain lock on the door was new as it was new on the market, and that after he received his money for the call, he left. (Tr. 229.)

Mrs. Lillian Welsh, tenant of the appellant's residence at 3919 17th Street, N. E., Washington, D. C., testified that she had met the deceased in 1961 and that the deceased had moved into appellant's room about May or June of 1962, when the appellant was suffering from a fractured ankle (Tr. 234-237), and further that the deceased had moved out in August of 1962 and that deceased was seen only intermittently thereafter (Tr. 237-239).

The witness continued that she had knocked on appellant's door on February 16, 1962, sometime between 10:00 a.m. (Tr. 246) and 1:00 p.m. (Tr. 241) but had received no answer; however, witness had not looked in to see if defendant was asleep (Tr. 246).

Maurice R. Welsh, husband of the previous witness, testified that he had last seen the appellant on the evening of February 14, 1963, when the witness retired for the evening, and the appellant remained in the living room watching television. (Tr. 253.)

He further testified that sometime between 6:00 p.m. and 11:00 p.m. there was a telephone call for the appellant and that he, the witness, cracked the door to the appellant's bedroom but that the appellant was not there (Tr. 254) and, he went on, the door was still ajar on the morning of February 16 (Tr. 255), when the witness left the house for a 9:00 a.m. class, returning at approximately 1:00 p.m., subsequently departing again to return at about 8:30 p.m. that evening (Tr. 256).

Robert Johnson, who lived in Apartment 302, 922 Madison Street, N. W. (Tr. 508), testified that he had heard a woman scream on the evening of February 16, 1963, and immediately thereafter heard someone kicking a door (Tr. 510), and then he heard three gun-shots which caused him to go to the second-floor landing in the apartment house (Tr. 511), where he heard someone striking piano keys in Apartment 202 (Tr. 512);

that he then proceeded to the first floor, heard a door open on the second floor, looked, and saw a man, whom he identified as the appellant, come out of Apartment 202, and proceed down the stairs, passing within 12 inches of the witness, and out the door (Tr. 512-514).

The witness further testified that he remained on the first floor until police arrived, followed by a man other than the appellant. (Tr. 515.)

Lewis Bellamy, ex-husband of the deceased, testified that he received a telephone call from Mr. Henderson on February 6, 1963 (Tr. 356) and that he contacted and met the deceased and together proceeded to Precinct No. 6 (Tr. 358) and that then the witness, the deceased, and some officers went to 922 Madison Street, N. W., where they saw the appellant in pajamas (Tr. 359); that the deceased requested keys to the apartment and that the appellant rolled back the rug and gave them to her (Tr. 360) and that the deceased thereupon requested the appellant to leave the apartment; that the appellant gathered various things together (Tr. 361) and the witness noticed while he was waiting that clothes were all over the apartment and that things

were out of the wastebasket (Tr. 363), and after the appellant had finished his packing, the witness carried two pieces of appellant's luggage to the street (Tr. 362), and all parties left the apartment.

The witness drove with the deceased to his job, where she left him (Tr. 364) and after work, the witness went to the Henderson's home at about 6:30 p.m. and later left, alone (Tr. 365). He received a telephone call at about 2:30 p.m., the witness continued, on February 7, 1963, from the deceased (Tr. 367) as well as a call on the afternoon of February 8, 1963, and the witness went to the Henderson's at about 1:00 p.m. on February 9, 1963, where he had lunch, and then went with the deceased, and Mr. and Mrs. Henderson to look at apartments and later purchased a lock for the deceased (Tr. 369); that the group later went to the deceased's apartment at 922 Madison Street, N. W., cleaned the apartment up and that the group left at about 10:00 p.m., when they returned to the Henderson's where the witness parted company with them (Tr. 370).

The witness continued, that he returned to the Henderson's on February 10, 1963, at about noon (Tr. 370) to get

keys from the deceased so that the witness and his brother could install a new lock in the deceased's apartment (Tr. 371); and that after they had installed the lock, they returned to the Henderson's where the witness returned all of the keys to the deceased, talked for awhile and then departed (Tr. 372-373).

The deceased called the witness on February 11, he continued, and as a result he met the deceased at his residence (Tr. 373) and they then each, driving separately, went to deceased's apartment (Tr. 374); that while at the apartment, the deceased made a telephone call, dressed, and they both left the apartment at about 8:00 p.m. (Tr. 374-375); he was also called on February 12, 1963, and as a result, they met at the witness' apartment at about 3:00 p.m., went out shopping and purchased a clock and returned to the witness' apartment (Tr. 376) where deceased spent the night, but they both went to work on February 13 (Tr. 377).

The witness received telephone calls from the deceased on February 14 and 15 (Tr. 378) and met the deceased on February 15 at the Corporation Counsel's office at about 2:30 p.m. (Tr. 379), departing at about 3:00 p.m., with the deceased still there (Tr. 380).

On February 14, 1963, while the witness was at the deceased's apartment, the witness called the appellant at about 7:30 p.m. (Tr. 381) and the appellant told the witness in answer to the witness' inquiry, that "it will be all over this weekend" (Tr. 382).

The witness testified that he met the deceased at 9:00 a.m. on February 16, 1963, at the Corporation Counsel's office but that he left there at about 10:00 a.m. with deceased (Tr. 384), drove to the Henderson's and took the deceased and Mrs. Henderson downtown where he left them; that he went to a friend's house, returning to his own home at about 6:30 p.m. (Tr. 385-386) and called the Henderson residence (Tr. 387).

As a result of the telephone conversation, the witness went to the deceased's apartment, knocked on the door and announced himself. (Tr. 389.) Over the objection of the defense, the witness was permitted to testify that the deceased said "help, Brad is here and he has a gun." (Tr. 391.) As a result, the witness kicked the door (Tr. 391), ran down the stairs, hearing three shots (Tr. 392) and tried to have the woman in the first floor apartment call the police, and failing to make her understand what he wanted, he ran out

of the building and ran one and a half blocks to the nearest phone that he knew of that was not being used, to telephone the police (Tr. 393), and that after telephoning the police, he returned to the apartment in time to see the police arriving and that he followed the police into the apartment (Tr. 394); that while he was there, he was searched by the police and stayed until about 8:30 p.m. (Tr. 395-396) and later went to the morgue where he identified the body of the deceased (Tr. 396).

Vermelle Whittaker testified that on the night of February 16, 1963, she was in Apartment 101, 922 Madison Street, N. W., and was disturbed by a man knocking on the door of her apartment, not the appellant, who tried to tell her something that she could not understand and who left, later to return with the police and that as a result of conversation she called the police. (Tr. 111-113.)

Mrs. Constance P. Warren, a friend and client of the appellant, testified that she attempted to reach the appellant at his home between 5:30 p.m. and 6:30 p.m. (Tr. 526) on February 16, 1963, on a legal matter, and that there was no answer (Tr. 525), but that she later received a telephone

call from the appellant between 7:00 and 7:30 p.m. wherein he asked her if he might come over; however, the witness declined (Tr. 527); that she was quite sure that it was the appellant's voice as she knew it, and further, there did not appear to be anything strange about it (Tr. 532).

Mrs. Barbara Copeland Johnson, who had worked for appellant as a secretary in 1955 (Tr. 539), testified that she had received a telephone call from the appellant at about 8:00 p.m. on February 16, 1963 (Tr. 540), and that she was sure of the time, as she was watching the Jackie Gleason Show when he called (Tr. 541) and asked to come over. (Jimmie Silman, Jr., Program Director for WTOP-TV, testified that the Jackie Gleason Show was only on WTOP-TV between 7:30 p.m. and 8:30 p.m. on the evening of February 16, 1963, in the Washington, D. C., area. (Tr. 559.)) Mrs. Johnson accepted the appellant's offer and appellant said that he would bring a bottle over (Tr. 541), and he arrived at about 8:20 p.m. The witness heard a knock on the door at about 9:00 p.m. (Tr. 545) and heard the appellant tell the police officers who entered that he, the appellant, had arrived at about 7:00 p.m. but the witness corrected him and told

the appellant that he arrived after 8:00 p.m. (Tr. 547).

Mrs. Marian Byrd testified that she was present when the appellant was arrested (Tr. 554) and that she heard the appellant tell the police that he had arrived at 7:00 p.m. but that Mrs. Johnson had corrected the appellant (Tr. 555).

Pvt. Orion L. Curtis, Metropolitan Police Department, testified that on February 16, 1963, at about 9:15 p.m., he told the appellant that the appellant was under arrest and that the appellant asked for what reason the charge was made as he, the appellant, had been with Mrs. Johnson since 7:00 p.m.; however, Mrs. Johnson had told the appellant that he was mistaken (Tr. 568-569) and that the witness searched the appellant and found a Baretta automatic pistol (Tr. 570). (The Government stipulated that the pistol was not of the type that killed the deceased. (Tr. 574.))

Dr. Vincent Guandolo, a medical doctor, testified that he had examined the deceased on February 16, 1963, at 7:30 p.m. and found her to be dead. (Tr. 101-104.)

Dr. Marion Mann, Deputy Coroner for the District of Columbia, testified that deceased's death was caused by a gunshot wound to the head and that the resulting damage was so severe as to be incompatible with life. (Tr. 127-128.)

John R. Traynham, brother-in-law of the deceased (Tr. 575), testified that he had assisted the deceased in moving out of the house she occupied with her ex-husband about the Christmas season of 1962 (Tr. 576), and that the appellant had also assisted (Tr. 577); further the witness stated that he found a revolver and that the appellant took the revolver (Tr. 578) and, in the presence of the deceased, the appellant told the witness that the revolver was for the protection of the deceased and the deceased did not contradict the appellant's statement (Tr. 583).

The prosecution then rested its case.

Counsel for appellant moved for a directed verdict on the grounds that the prosecution had failed to make a prima facie case (Tr. 636) and was overruled.

Counsel for the appellant made his opening statement to the jury in which he stated the defense was that appellant did not concede that he committed the offense, but that if he did, appellant was insane at the time. (Tr. 651-660.)

Halcott A. Bradley, the appellant, testified in his own behalf that he came to Washington, D. C., for the first time in August 1929 (Tr. 666) on his way to Lincoln University

in Oxford, Pennsylvania, to accept a college scholarship (Tr. 663) but that he became "entranced" with Washington and after first getting a job as a houseman in the Highland Hotel, he took a job as a baggage porter at Union Station (Tr. 667) and registered at Howard University in January 1930 and worked as a porter and went to school. until July 1933(Tr. 668) when he married his first wife, Agnes. Thereafter, he worked at several jobs to make ends meet and provide for his wife and two children (Tr. 670-674) and in December 1938, was appointed a Private with the Metropolitan Police Department (Tr. 675). He and his first wife separated in 1942, but he continued to support them (Tr. 677); and sent his two children by this marriage through college (Tr. 679).

The appellant further testified that in 1942 he had started to work as a real estate salesman (Tr. 681) and that he resigned from the police force in 1945 and worked only in real estate until September 1946, when he entered law school at Howard University and remarried in January 1947 (Tr. 682) and continued to go to school and work at the same time, graduating cum laude in 1949 (Tr. 684).

The appellant's second marriage failed, and it was legally ended in 1955, though there was a separation in 1952 or 1953 (Tr. 686), and during this period he was just floundering around (Tr. 687); that he set up his own business in real estate in 1953 (Tr. 688). He met Mrs. Nancy Harris in 1956 and after a good deal of "soul searching" they were married on July 12, 1957. (Tr. 691-693.)

However, due to an ailment, of which the appellant was not aware at the time, Mrs. Nancy Bradley became slothful (Tr. 695) and the appellant thought that he was again in a situation (Tr. 697) where he was running around in circles and not getting anywhere (Tr. 698), and his third wife left him in March 1960 (Tr. 700), at which point he saw no point in working (Tr. 698); that for the period 1953-57 he had averaged about $7,500 gross income, $10,000 gross in 1958, $13,000 gross in 1959, $5,300 gross in 1960, and $3,500 gross in 1961, and he attributed the dimunition of income to his loss of interest in working -- he just was working to live (Tr. 699), he was in a very confused state of bewilderment (Tr. 700) and dejection (Tr. 701); and as a result did not follow through on things the way that he should have

(Tr. 702) and went to the office only with reluctance, leaving as soon as he could (Tr. 703).

Though Nancy's suit for divorce on the grounds of cruelty was dismissed as without merit (Tr. 704), she was awarded custody of the child, which award he fought until he obtained a divorce from her; that during this time he was drinking more than he usually did (Tr. 706).

He had first started buying property when he joined the police force and had kept all of his accounts current until 1960 when he had to refinance all of his notes in order to keep going (Tr. 709); however, even then he could not keep current on his bills, and his feeling of despondency and dejection increased (Tr. 710) and he was forced to borrow money from friends in order to keep going, which "made a chronic condition get acute" (Tr. 711).

During this same period, he was having trouble with the attorneys with whom he shared office space as they were unable to pay their rent and even though he always had the money for his own rent, 27 landlord and tenant suits were filed against him in the period of August 1958 to August 1961 for nonpayment of rent, and this served to aggravate his condition. (Tr. 712-713.)

The appellant further testified that he first met the deceased in July of 1961, when she approached him to act as her attorney in a divorce proceeding. (Tr. 717-727.) After attempts at reconciliation, a separation agreement was signed between the deceased and Lewis Bellamy in mid-August 1961 (Tr. 730-731), and the appellant did not expect to see the deceased again (Tr. 732).

However, the deceased started to call him in September 1961 on questions regarding the agreement (Tr. 733) and in the latter part of September 1961, she stareted to contact him at his home, though he had neither given her his home number nor asked her to call him there (Tr. 734); and the nature of the calls began to change, and though they were "not talking love" (Tr. 734), they were "just talking" and the conversations lasted for as much as two hours (Tr. 735).

The first personal visit under this new relationship came about at "mutual suggestion" in mid-October, when de-deceased stopped over to see appellant's home for about 30 or 45 minutes (Tr. 736); about four or five days later, deceased returned to have lunch with appellant and stayed about two hours -- though there was still nothing personal

going on -- but after that they began to have 3, 4, and 5 telephone conversations a day, "until all hours" (Tr. 738). Among other things, they discussed a dance at appellant's club on October 27, 1961, to which the appellant did not wish to go, but if he did, he felt obligated to take another person, but since the other person had had an accident, he took the deceased. (Tr. 739.) At the dance the deceased felt slighted, and they had a little argument, after which they sat in his car until dawn talking about it. (Tr. 740.) The next day, the deceased gave the appellant a bill and asked him to pay it, but appellant told her that he would not do so. (Tr. 763.) Their association continued and on November 15, 1961, deceased spent the night with the appellant after a party next door; but on November 16, 1961, Mrs. Nancy Bradley called to "talk about things", and the deceased got upset. (Tr. 741.) Also during the month of November 1961, appellant had given deceased his charge plate at Kann's Department Store and told her to buy $65 worth of goods for herself and her children (Tr. 764), but she spent over $100 on herself and nothing on her boys. The appellant then told the deceased to go out and get

something for her boys, but not to spend more than $35 however; she did and the appellant told the deceased that he did not like pressure (Tr. 765); and as a result of these scenes, and because the appellant had not made up his mind about his relationship with another woman, he decided that he and the deceased should take a "moratorium" on their relationship (Tr. 742).

However, the deceased continued to come around and to call the appellant, but business was still bad, so appellant decided that he would see no one socially and concentrate on business in January. (Tr. 743.) But in the middle of December 1961, the girl who had been his secretary since 1955 quit him without notice. (Tr. 744.)

He took the deceased to a party on January 1, 1962, with the intention of later seeing his other friend, but on the way to taking the deceased to her home, they stopped at appellant's home and were met by this other woman, Mrs. Olive Johnson. (Tr. 746.) The group then went into appellant's home where the appellant explained that he wanted to devote all of his time to work; the deceased left by cab, and the appellant took Mrs. Johnson home. After taking Mrs. Johnson home and returning to his home, appellant received a

telephone call from the deceased and as a result he went to her home where they talked until daybreak but he did not change his mind. (Tr. 747.)

On January 2, 1962, Mrs. Johnson telephoned the appellant at about 11:00 a.m., and appellant invited her over to his office. While they were talking, the deceased entered and there was a bitter exchange of words, the upshot of which was that the appellant told the deceased that he thought that he was "better off" with Mrs. Johnson and that he, the appellant was going to stay with her. (Tr. 748-750.)

The deceased continued to contact the appellant, but he remained adamant; but during the third week of January 1962, she saw the appellant and he arranged for her to see a doctor. (Tr. 750-753.) As a result of the deceased's trip to the doctor, the appellant told Mrs. Johnson that though he would rather stay with her, Mrs. Johsnon, he thought that it was best that he "stick with" the deceased "while she is pregnant", at least. (Tr. 754.)

The deceased had a miscarriage before Easter, 1962, but their relationship continued to wax in intensity and

the appellant saw the deceased every day (Tr. 768), and though he tried to work, he had neither the power, the desire, nor the judgment to do so (Tr. 769), though he had gotten a secretary about mid-February to come in on a part-time basis from noon until 4:30 p.m. (Tr. 770). During the spring of 1962, they decided that the deceased's two boys should go away to school, as it would be much better for them; and about May 7, 1962, the appellant drove the deceased and her two boys to Pittsburgh for an interview at a school that they thought the boys would like and one that the deceased could afford. (Tr. 771.)

At this time the general drift of conversation was "if" they got married, they would do certain things, and the appellant decided to make a big effort to get back to work. He arranged for his secretary to start working full-time in July 1962, but he had an accident on July 1, 1962, and was confined to a hospital bed until July 8, 1962, when the deceased went home with the appellant in order to take care of him; however, he returned to the hospital about July 25, 1962, to have an operation. (Tr. 773-774.) This period and up to January 1963 were days and nights of endless terror

for him (Tr. 775), as bills and expenses were mounting up and he was not able to care for his business as he should have (Tr. 774).

Also during this period the appellant and the deceased started to discuss marriage seriously, as well as the appellant's financial difficulties. (Tr. 776.)

A divorce was obtained for the deceased in October 1962 (Tr. 781), and they decided that it would be best for the deceased to get an apartment, which she did, at 922 Madison Street, N. W., and the deceased moved into the apartment around the 3rd or 4th of December 1962 (Tr. 782-783). During this same period, one of appellant's houses was put up for foreclosure and the appellant started to play the numbers (Tr. 783-784) to "clear (his) mind of the fog and the pressure and the thing that was pounding in him all of the time (his debts) so that (he) could get back to his office"; however, the pressure was only magnified (Tr. 785). Their relationship continued to be harmonious up to the middle of December, when the deceased went on a shopping spree, though all of the money that she spent was her own. (Tr. 786-787.)

The deceased paid the money for the rent of the apartment at 922 Madison Street, N. W., and the appellant for the food. (Tr. 788.)

The appellant had given the deceased a gun because she had asked him for one following a visit that she had had from her ex-husband (Tr. 789), and the gun was kept in the piano stool in the deceased's apartment (Tr. 791). The appellant spent most of January 1963 at the deceased's apartment though he went to his own home at least once a day and into the office daily, too, though only for an hour or so. (Tr. 795.) During this time the deceased was continually complaining to appellant of the many bills that she had and how hard it was for her to pay them. (Tr. 796.) Appellant was six months behind in his office rent and behind in his telephone bill, too, but about January 10, 1963, appellant gave the deceased $40 to help pay her February rent. (Tr. 798.) All in all, though, aside from the continual nagging of the appellant by the deceased in reference to money matters, their relationship was excellent. (Tr. 800.)

On Sunday, February 3, 1963, the deceased suggested that they go out to practice on the gun the appellant had

given to her, so they took the gun with them when they went to pick up the appellant's son -- as was usual on Sundays. They spent the day with the appellant's son and after returning the boy to his mother's, they proceeded to the home of the deceased's mother, where they stayed for some time playing cards, and then went to the golf course for target practice, and the deceased had the gun at all times. (Tr. 800-801.)

Appellant also paid deceased's telephone bill on February 4, 1963, though his own office telephone was scheduled for discontinuance for nonpayment. (Tr. 803-804.) On the 5th day of February, the appellant decided to go to his office the next day to get started again. (Tr. 805.)

On the evening of February 5, 1963, the deceased and the appellant had dinner, changed into their night clothes and began to watch TV. Deceased fell asleep and was awakened by appellant at 10:00 p.m.; however, deceased then decided to wait for the appellant in order to retire again, but she changed her mind and retired at 11:00 p.m. while the appellant was watching the late news. After the news, appellant went to the bedroom but since the deceased was asleep,

he decided to watch the late show as he was not sleepy.

About 12:30 a.m., appellant went to fix himself another drink during the commercial. On returning, he noticed a brown envelope sticking up in deceased's handbag -- it was her bank statement and showed a balance of over $1,100.00. After looking at it, "a violent trembling seized (him) all over (his) body."

The deceased had awakened, and when she walked in and saw the appellant fumbling trying to get the statement back into the envelope, she said "what are you doing with my bank statement?".

"At that very instant," the appellant felt as if a bomb blew up in (his) head, a huge white light." (Tr. 806-807.)

The next thing that the appellant testified to remembering was picking himself up off the floor in the lobby of the apartment at the bottom of the flight of stairs, with his ankle feeling as if it was broken again. And from that point until about 8:00 p.m., on February 18, 1963, or a period of twelve days, the appellant had only incomplete and brief memories. (Tr. 808.) He tried to piece things

together as to the happenings during that period but had been unable to do so. (Tr. 809-810.)

The appellant had no memory of February 7, 8, 9, or 10, though he did remember part of February 11 (Tr. 810-813), when he went to Court, but even about that his memory was sketchy and incomplete. He further remembers talking to Lewis Bellamy in reference to the relationship between the deceased and the appellant, and as a result of that conversation, he seemed to remember a vague feeling of apprehension and of being upset and disturbed and immediately going to his bedroom and getting his Baretta gun and putting it into his pocket. (Tr. 814-815.)

However, he remembered nothing of February 12 (Tr. 816), February 13 (Tr. 817), February 14 (Tr. 818), though he did remember looking out of his window, looking for and seeing a cab, which happened on February 15, though he remembered nothing else about that day (Tr. 822).

He recalled the sun shining in the window of the dinette in the deceased's apartment, the deceased's apartment, mixing a drink, a period of darkness, and sitting in a chair by the bed with his foot elevated with a light on, but was not sure in what sequence these occurred or when. (Tr. 823-824.)

The appellant had no recollection of ever having hit, struck, or threatened the deceased at any time; he was aware of a "sort of compulsion" to see the deceased. (Tr. 825.)

He did recall looking at his watch on February 16, at about 10:00 a.m., and then had a feeling that he had to put his "number in," calling "the fellow" and placing his wager and further telling "the fellow" that he would see him at his (the appellant's) house at about 6:00 p.m. but did not remember voice or time that this was done, except that it was subsequent to 10:00 a.m. (Tr. 826-827.)

Appellant had no recollection of anything else that happened on the 16th of February or of February 17, and the next thing that appellant remembered was being in the D. C. Jail about 8:00 p.m. on February 18. (Tr. 829-831.)

On cross-examination, the appellant said he recognized his hat and coat that were found in the deceased's apartment, but did not remember if he had left them at the deceased's apartment, and he also identified the Baretta automatic as being similar to the one that he owned. (Tr. 836-838.)

The appellant stated that he had given the deceased a revolver but he did no know or remember the caliber nor

did he remember ever buying ammunition for it. (Tr. 839-841.) He stated that he and deceased had gone to practice with the revolver once or twice in May 1962, but that they had never shot it more than once or twice on those occasions, and spent most of the time instructing the deceased how to hold and aim the revolver properly. (Tr. 842-843.)

The appellant stated that though he was with the deceased on February 3, 1963, he did not remember who took the gun after the practice, but felt sure that it was the deceased (Tr. 845-847) after they had practiced that evening about 11:30 p.m. (Tr. 848-852).

The appellant further testified on cross that he and not Mrs. Mary Bradley, his first wife, had paid his way through law school (Tr. 857); that he met Mrs. Constance Polly about 1950 while he wa still married to his first wife, though he was not performing the duties of a husband at that time (Tr. 862); that he met his third wife, Nancy in 1955, and paid a portion of the costs for her divorce (Tr. 863), and married her before her divorce decree had become final (Tr. 864); that Mrs. Nancy Bradley had left the appellant on March 14, 1960 (Tr. 864), but that prior to that

appellant had not attempted to have her leave (Tr. 865); however, he remembered but very little of the divorce proceedings in Court on February 11, 1963, though he was, at around that time, having Mrs. Nancy Bradley followed in order to increase the child visitation rights that he had (Tr. 865-866).

He further testified on cross that his conversations with the deceased started to become of a personal nature about the beginning of October 1961 (Tr. 872), and that they went to New York together after Christmas -- even though the deceased had wanted to go to Bermuda -- and that he paid all of the bills for that trip (Tr. 877-878).

The appellant testified that the deceased had told him that she felt that he was using her to boost his ego because of the difference in their ages (Tr. 910) but that he let her have her way because he did not want to create arguments (T. 927).

In reference to the bank statement, appellant testified on cross that he remembered no conversation or discussion about it with the deceased (Tr. 938); that the deceased was causing him great financial hardships because of the demands that she made on him constantly to go out and demanding certain sums (Tr. 940-950).

Under extensive cross-examination, the appellant reiterated that he remembered but brief fragments of the period of February 6 to February 18, 1963. (Tr. 958-396.)

The defense next called Mrs. Elizabeth Bower, who testified that she had known appellant since the 40's and had done business with him since the 50's and that she had noticed a change in him in the 60's and that she took her business away from him because he did not seem capable of doing the work any more; that she had talked to the appellant over the telephone during February 1963 and that he seemed to be quite upset and was unable to finish several conversations because of this. (Tr. 996-1008.)

Mervin O. Parker, vice president and cashier at the Industrial Bank of Washington, testified that he knew the appellant as a lawyer for the bank since 1955 and he noticed in the period 1961-1962 that the appellant became absent-minded and less attentive to business. (Tr. 1009-1022.)

Dr. Samuel Bullock, a medical doctor, testified that he had known the appellant since the late 1930's (Tr. 1024) and personally and professionally since about 1947 or 1948 (Tr. 1025), and that he had told the appellant in 1957 that

he, the appellant, should see a psychiatrist as soon as possible (Tr. 1028) and many times thereafter.

Lewellyn Berry, a medical technician, testified that he had given pregnancy tests to the deceased and that she was pregnant in March 1962. (Tr. 1037-1039.)

Mrs. Olive T. Johnson testified that she first met appellant in the summer of 1959, on a legal matter but that their relationship became personal after March 1960 and that this relationship terminated in 1961 (Tr. 1043-1044); that appellant had told the deceased that he was choosing this witness, but that later a situation arose whereby the witness gave the appellant the choice of either staying with her, the witness, or going with the deceased, and that the appellant told her that he felt that he had to go with the deceased (Tr. 1044-1058); that the appellant was not working during the latter part of 1961 because he did not feel like going to the office (Tr. 1065).

Michael J. Bresnahan, of the C & P Telephone Company, testified that the appellant's office phone was in fact going to be cut off and that the deceased's phone bill had been paid on February 4, 1963. (Tr. 1082-1095.)

Catherine Grainger, of S. Kann Sons & Company's credit department, testified that the appellant had an account with that store and that although the account had been kept current up to August 1962, after that date, the account went sour. (Tr. 1096-1121.)

E. L. Miller, assistant cashier of the National Bank of Washington, testified that the deceased had had an account with the bank and that the balance in January 1963 was $1,201. (Tr. 1123-1128.)

Phillip Evans, clerk with the Perpetual Building Association testified that the appellant had various accounts with the association over a period of time and that they had all been current up until October 31, 1961, but that after that payments were very irregular. (Tr. 1129-1137.)

Dr. Eugene Stammeyer, a clinical psychologist at St. Elizabeths Hospital, testified that he had examined the appellant on June 17, 1963, and felt that the appellant was basically a very immature person who was quite capable of losing emotional control rather easily (Tr. 1145), and that appellant had an obsessive-compulsive personality and his condition would continue to worsen; that appellant's

condition was probably in existence during February 1963 (Tr. 1148) and further that, in his opinion, appellant's condition was a mental illness of such kind and character that it could cause a person to commit an act of violence such as murder (Tr. 1149); that appellant's mental condition had been further complicated by factors of involutional melancholia and early organic changes to the central nervous system; and that the process of aging had intensified this personality maladjustment tc the point of mental illness (Tr. 1169). However, the witness stated on cross-examination that he had accepted the appellant's statement of lapse of memory for the period of February 6-18, 1963 (Tr. 1210); that he could not say that every act of appellant in February was a result of a mental illness; that the killing was a result of a mental illness due to appellant's reaction to the happening on February 6, 1963, whether or not there had been an argument between appellant and the deceased on February 16, 1963 (Tr. 1213-1226).

Dr. Winfred Overholser, a medical doctor and former superintendent of St. Elizabeths Hospital, presently in private practice in the District of Columbia, testified

that he examined the appellant in July and September 1963 and that amnesia was a symptom of mental illness, but that if the memory loss had occurred after the crime, then the crime would not be a product of the mental illness. The witness felt that the appellant was suffering from hysterical disassociations. (Tr. 1229-1249.)

Dr. Glenn Legler, a medical doctor, staff psychiatrist at St. Elizabeths, testified that the appellant was suffering from a personality disorder and was a compulsive personality, severe type, with disintegration manifested mainly by depression features with early involutional reaction and was suffering from this mental disease on February 16, 1963; that amnesia is one of the manifestations of excessive stress, but that the amnesia could have occurred after the happening on February 16, 1963, which would cause the appellant to blank out the period February 6-18, 1963. (Tr. 1250-1304.)

Miss Jacqueline Davison, daughter of the appellant, testified that the appellant was a good father to her (Tr. 1324) but that after the appellant broke his ankle in July 1962, the witness noted the appellant's depression, his worry and his loss of interest in his work (Tr. 1325).

Several witnesses were called who testified to the appellant's general good reputation for peace and good order.

Mrs. Nancy Bradley, an ex-wife of appellant, was called in rebuttal (Tr. 1328) and testified that she met the appellant in 1955 and that they were separated in 1960 (Tr. 1329) and divorced in February 1963 (Tr. 1330); that she had not volunteered her testimony but rather that the appellee had issued a summons to her (T. 1345).

Since the appellant's counsel objected to this witness testifying, the Court below first heard the testimony out of the presence of the jury.

Over objection, the witness testified that the appellant slapped her in the face (Tr. 1332) and her teeth were so loosened by the blow that she had to go to the dentist, and that she was later struck by appellant, and that both strikings took place between 1955 and 1957 (Tr. 1333); that she subsequently married the appellant; that appellant was not easily angered but that when he was angered, he became violent. Again over objection, the witness testified that appellant was possessive, jealous, and wanted all of witness' attention (Tr. 1339).

Over objection, witness testified that she saw the appellant in February 1963 during the divorce proceedings and that she observed nothing unusual about appellant. (Tr. 1340.)

In the presence of the jury, the witness repeated the above testimony. (Tr. 1343-1351.)

On cross-examination, the witness testified (over the objection of the prosecution) that appellant had something wrong with him. (Tr. 1352.)

Over objection of defense, Edna Henderson testified that she had never heard Lewis Bellamy threaten the deceased, nor had deceased ever told her that Lewis had threatened her. Over further objection, the witness testified that after February 6, 1963, deceased told her that someone had threatened her life (Tr. 1357-1358), and that appellant had told her that he and deceased had had a misunderstanding (Tr. 1360).

Officer Orion L. Curtis, of the Metropolitan Police, called in rebuttal, and over objection, testified that the appellant had asked him, "what is this all about?" twice (Tr. 1362-1363), and that the appellant kept asking for a drink

of whiskey (Tr. 1363), but that appellant had not complained to the witness of any loss of memory (Tr. 1363); and that the only unusual thing that the witness noticed was that the appellant had been drinking, but he did not consider the appellant to be drunk (Tr. 1364).

Dr. Mauris M. Platkin, a medical doctor and a specialist in psychiatry at St. Elizabeths Hospital, testified on rebuttal that he had examined the appellant twice for about one-half hour, once for about five minutes, and had observed and questioned the appellant for about an hour and a half during the staff conference (Tr. 1372), and that the witness' opinion was that the appellant was suffering no mental illness at the time of the conference, June 20, 1963, nor at the time of the crime, February 16, 1963 (Tr. 1374), and further, that appellant was suffering from no mental defect at either of the times (Tr. 1375); that he was told of appellant's loss of memory, but that he had no confirmation of this (Tr. 1376); and that although the appellant had an adjustment problem, it was not a mental illness (Tr. 1381).

On cross-examination, the witness testified that he was sure that he saw the appellant at the times testified

to (Tr. 1383) and that amnesia is not a mental illness (Tr. 1384).

Dr. David J. Owens, a medical doctor and clinical director of St. Elizabeths maximum security unit, testified on rebuttal that he had seen the appellant at the staff conference and on one previous occasion (Tr. 1401) and for a rather brief time (Tr. 1403) and that the witness had formed an opinion at the staff conference, based upon the discussion of all those present, that appellant had no mental disease either at the time of the conference or of the crime, nor did the appellant have a mental defect at either time (Tr. 1407-1408).

Arthur F. Mitchell, of the Metropolitan Police, who was one of the appellant's arresting officers, testified that the appellant had told him that he, the appellant, had no hat and coat with him and that these were in the appellant's car which was somewhere in the neighborhood (Tr. 1420) and that the appellant seemed depressed but did not complain of any memory loss (Tr. 1421).

Edward A. Ison, of the United States Weather Bureau, testified that on February 16, 1963, the temperature

varied between 27° at 3:56 p.m. and 21° at 7:59 p.m. (Tr. 627.)

John William Cannon, of the Metropolitan Police, testified that the appellant told him that he had been in the deceased's apartment on February 15, 1963, and that the appellant and the deceased had had a spat (Tr. 1427); that on February 16, 1963, the appellant had said that he had spent that day at home alone and that later he had walked to the vicinity of his law office and then gone to Cecilia's restaurant but that he had not been to deceased's apartment (Tr. 1428); that appellant had further told the witness that he was carrying a gun because there had been trouble in the neighborhood (Tr.1430); that he, the witness, had handled many cases of mental illness, and in the witness' opinion, the appellant was not suffering from any mental illness at the time of his arrest (Tr. 1431).

Counsel thereafter summed up, and the Court charged the jury which returned its verdict of "Guilty of Second Degree Murder." Appellant was sentenced to a term of 10 to 30 years.

STATUTES INVOLVED

District of Columbia Code (1961 Ed.)

Section 22-2401. Murder in the first degree -- purposeful killing -- killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, * * * of deliberate and premeditated malice * * * is guilty of murder in the first degree.

Section 22-2403. Murder in the second degree.

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Section 22-2405. Punishment for manslaughter.

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

STATEMENT OF POINTS

1. The Court below erred in allowing the prosecution, in "rebuttal," to show through a former wife of the defendant that several years prior to the alleged offense, the defendant had become violent and struck her, loosening two of her teeth and that the defendant had been jealous and possessive.

With respect to Point 1, appellant desires the Court to read the following pages of the reporter's transcript: 985-987; 1326 through 1352.

2. The Court below erred in admitting a statement of the deceased, without inquiry into the circumstances of its utterance, to the effect that defendant was in a room with her and had a gun.

With respect to Point 2, appellant desires the Court to read the following pages of the reporter's transcript: 389 through 391; 483-489.

3. The Court below erred in not admonishing the members of the jury each time before they separated that they were not to discuss or read about the case.

With respect to Point 3, appellant desires the Court to read the following pages of the reporter's transcript: 37, 87, 121, 178, 318, 404, 449, 533, 618, 644, 689, 755, 827, 920, 1008, 1107, 1158, 1163, 1249, 1316, 1421, 1432, 1517, 1585.

4. The Court below erred in permitting the prosecutor to argue to the jury that he not only represented the District of Columbia, but also the deceased.

With respect to Point 4, appellant desires the Court to read the following pages of the reporter's transcript: 1582-1583; 1589-1590; 1645.

SUMMARY OF ARGUMENT

I.

The Court below erred in permitting the prosecution, in "rebuttal" and over objection, to show that the defendant, seven years ago (prior to the alleged offense), had violently struck the "rebuttal" witness, loosening her teeth -- for which he was not now on trial -- and further to show that defendant had been jealous and possessive. Defendant had not testified to that incident on direct and, on cross-examination, merely stated that he had no recollection of the same.

Such testimony was not proper rebuttal, as it involved an entirely collateral matter. It could only go to show a vicious propensity on the part of the defendant, and where the jury had a choice of finding him guilty of a lesser degree of homicide, such testimony would be most prejudicial to such a finding.

II.

The Court below erred in not inquiring into the circumstances of a quoted statement of deceased before admitting such statement as a spontaneous or excited utterance. The quoted statement, highly damaging to defendant, was strictly hearsay, and before admitting it, the Court should have gone into greater detail as to the circumstances of its utterance. The record merely shows that she "said" the words.

III.

The Court below erred in failing to admonish the members of the jury each time they separated that they were not to discuss or read about the case, particularly when the case involved a capital offense and the trial was protracted, with its progress being reported in the press. Such admonition is required of the trial judge.

IV.

The Court below erred in permitting the prosecutor to argue to the jury that he (the prosecutor) represented the people of the District of Columbia and also the deceased, and in not admonishing the jury otherwise.

The prosecutor represents the sovereign in a criminal case, and not the victim of crime. Such argument is highly improper.

ARGUMENT

I.

The Court below erred in allowing the prosecution, in "rebuttal," to show through a former wife of the defendant that several years prior to the alleged offense, the defendant had become violent and struck her, loosening two of her teeth and that the defendant had been jealous and possessive.

The record shows (Tr. 1326-1352) that the first time the appellant was asked if he ever struck one of his former wives (Nancy) was on cross-examination. (No such inquiry was made of him on direct.) Appellant answered that he had no recollection of striking her, and also that he did not strike her.

The prosecution then called Nancy in "rebuttal," and the Court permitted her, over objection, to testify that when appellant became angry he was violent; that in 1956,

before they were married, appellant slapped her in the face, loosening two teeth, and that she required medical attention; that appellant slapped her one other time, also prior to their marriage; that appellant was jealous and possessive and wanted to know where she was, at all times. (Tr. 1348-1352.)

These items of testimony were entirely collateral to the issue. They could not have been introduced by the prosecution in its case in chief and could not be smuggled in on cross-examination with a view to "rebutting" an anticipated denial, a prosecutor's tactic condemned by the Supreme Court in Agnello v. United States, 269 U.S. 20, 35.

In the case of Martin v. United States, 75 U.S. App. D. C. 399, 402, 127 F. 2d 865, 868, Justice Stephens, in his concurring opinion, states the rule to be:

> The rule is well settled that if a witness is cross-examined upon a fact purely collateral and irrelevant to the issue his answer cannot be contradicted--for the obvious reason that if it could be the investigation might thus branch out into any number of immaterial issues upon the mere question of the credibility of the witness. The test of whether or not a

> fact inquired of in cross-examination is collateral is: Would the cross-examining party be entitled to prove it as a part of his case; if so, it is not collateral; otherwise it is.

See also Walder v. United States, 347 U. S. 62, 66-67, where the Supreme Court says:

> The situation here involved is to be sharply contrasted with that presented by Agnello v. United States, 269 U.S. 20, * * *. There the Government, after having failed in its efforts to introduce the tainted evidence in its case in chief, tried to smuggle it in on cross-examination by asking the accused the broad question "Did you ever see narcotics before?" After eliciting the expected denial, it sought to introduce evidence of narcotics located in the defendant's home by means of an unlawful search and seizure, in order to discredit the defendant. In holding that the Government could no more work in this evidence on cross-examination than it could in its case in chief, the Court foreshadowed, perhaps unwittingly, the result we reach today:
>
> "And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search . . ." 269 U. S. at 35.

In the case at bar, the trial Court gave the jury a choice of not only acquitting appellant, but also of finding him guilty of second degree murder or manslaughter. The so-called rebuttal testimony was calculated to and did demonstrate to the jury that appellant had been a vicious, jealous, and possessive man. Without this testimony, the jury might have found appellant guilty of manslaughter, even though it did not accept the insanity defense. It may well have been that this improperly admitted "rebuttal" testimony was just the added factor that turned the scales against appellant. The prosecutor was quite anxious that the case should not go to the jury without it.

The words of the Supreme Court in Kotteakos v. United States, 328 U. S. 750, at 765, are appropriate here:

> * * * if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

II.

The Court below erred in admitting a statement of the deceased, without inquiry into the circumstances of its utterance, to the effect that defendant was in a room with her and had a gun.

The former husband of the deceased testified that when he came to the deceased's apartment, he knocked on the door, spoke out his name "in a soft voice" (Tr. 484), and, in response, deceased said, "Help, Brad is in here and he has got a gun." He was asked twice to describe the voice as she said that, and he answered both times, "She just said, 'Help, Brad is in here and he has got a gun.'" (Tr. 391.) (Emphasis added.)

This is certainly not a description of an excited or spontaneous utterance. Of course this statement is sheer hearsay, and unless it comes within one of the exceptions to that rule, it is inadmissible.

The Court did not even conduct an inquiry to determine if it should have been admitted. See: Guthrie v. United States, 92 U.S. App. D.C. 361, 365, 207 F. 2d 19, 23:

> Before admitting the challenged evidence in the present case, the trial judge conducted a painstaking inquiry, out of the presence of the jury, into the circumstances and conditions under which the statement was made. Having satisfied himself that the accusatory and descriptive declaration constituted spontaneous utterances within the exception to the hearsay rule, he permitted Stroebel's evidence to go to the jury. This was the exercise of a judicial discretion which it is generally held should not be disturbed on appeal except for a most compelling reason.

Neither the former husband of deceased nor any other witness ever testified that he saw or heard the appellant in the apartment at that time. The appelllant's presence in the apartment at that time was a crucial issue at the trial.

III.

The Court below erred in not admonishing the members of the jury each time before they separated that they were not to discuss or read about the case.

The trial commenced on November 12, 1963, and terminated on December 3, 1963 (with a 3-day recess due to the late President's assassination and a 4-day Thanksgiving holiday recess).

In the initial stage of the trial, the Court instructed the jury not to discuss the case and to refrain from reading any publicity concerning the same. (Tr. 37.) Although the jury was permitted to separate at the end of each trial day as well as for lunch, never again, prior to such separation, did the Court repeat such an instruction. (The trial Court only partially instructed the jury (Tr. 87, 178, 644, 1316, and 1432), but failed to give any instructions at all in most instances (Tr. 121, 211, 318, 404, 449, 533, 618, 689, 755, 827, 920, 1008, 1107, 1158, 1163, 1249, 1421, 1517, and 1585)).

(Investigation shows that during the course of the trial, the Washington Post carried a story on November 27, 1963, about the progress of the trial, and the Washington Afro-American, on November 16, 19, 23, 26, 30, 1963.)

It is respectfully submitted that the trial Court should invariably admonish the jury, among other things, against reading newspaper articles about the case. As this Court said in Coppedge v. United States, 106 U.S. App. D. C.275, 278, 272 F. 2d 504, 507:

The Court twice permitted the jury to separate overnight and again from Thursday to Monday. It did not admonish the jurors prior to any such separation against reading newspaper articles about the case. In Carter v. United States [102 U. S. App. D.C. 227, 231, 252 F. 2d 608, 612 (1957)], we quoted from our opinion in Brown v. United States [69 App. D. C. 96, 99 F. 2d 131 (1938), certiorari denied 305 U. S. 562, * * *]:

"* * * And in all criminal cases whenever jurors are permitted to separate, the court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and not to read published accounts of the course of the trial." (Emphasis added.)

We added, in Carter: "The language we then used 'the court should invariably admonish them', imposed upon the trial courts a requirement." This was one of the points upon which the judgment of conviction in Carter was reversed. The present case is a vivid illustration of the necessity for the rule. Under modern conditions juries are customarily permitted to separate, even over weekends, and, unless there be exceptional circumstances, they should be permitted to do so. Of course newspapers carry articles about public trials of sensational interest, and of course those accounts may, and frequently do, carry statements of facts totally outside the evidence being produced in the courtroom. Our newspapers have complete rights to publish such accounts and such additional facts. But it is essential to a fair trial of a defendant that the jurors should not know the contents of, lest they take account of,

> such newspaper stories. In order to protect so far as possible, this essential right of a defendant, we have required that trial courts call the attention of jurors specifically to the possibility of such newspaper accounts and to admonish jurors not to read them. This has been a rule for the past twenty years, or longer, and this is at least the third time we have emphasized it. What is said here applies with equal force to radio news broadcasts or telecasts.

See also Schoeneman v. United States, 115 U.S. App. D.C. 110, 317, F. 2d 173.

Appellant was on trial for a capital offense, and the trial Court failed, as stated above, to admonish the jury on numerous occasions, despite this Court's mandate. It is quite obvious that the trial Court ignored or misunderstood this Court's requirement on the subject. It would appear that compliance can only be enforced by the automatic reversal of every criminal case in which the trial Court fails to give the jury the proper admonitions. No trial Court today would fail to instruct the jury on reasonable doubt and presumption of innocence, knowing that such failure would result in reversal.

It is the trial Court's duty to properly admonish a jury whether request is made by counsel or not. The

trial Judge is not just a referee judging a contest. It is his task to see that a defendant is accorded a fair trial, free from possible outside influences.

IV.

The Court below erred in permitting the prosecutor to argue to the jury that he not only represented the District of Columbia, but also the deceased.

In his rebuttal argument to the jury, the prosecutor stated that he had two silent clients -- one, the people of the District of Columbia, and the other, the deceased. (Tr. 1582-1583.) Upon conclusion of the argument, defense counsel requested the Court to instruct the jury that such statements by the prosecutor were improper and should be ignored. (Tr. 1589-1590.) Defense counsel repeated this request at the conclusion of the Court's charge, and on each occasion the Court refused to so instruct. (Tr. 1645.)

It is respectfully submitted that the Court's refusal of these requests was error.

The Supreme Court, in Viereck v. United States, 318 U.S. 236 (quoting from Berger v. United States, 295 U.S. 78, 88), at page 248, stated:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,367

HALCOTT A. BRADLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
PAUL A. RENNE,
DAVID EPSTEIN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented on appeal:

1) Where the jurors were admonished at the outset and reminded during intervals not to discuss the case and not to read or listen to reports of the trial, and no evidence is present that the jury disregarded the instructions, did the court err by not repeatedly admonishing the jury at each recess?

2) Where the evidence shows that the deceased was being assaulted with a pistol, was her outcry for help, which named appellant as her assailant and occurred seconds before she was shot, properly admitted in evidence as a "spontaneous exclamation," an exception to the hearsay rule?

3) Whether the trial court properly exercised its discretion in allowing rebuttal testimony dealing with criminal intent, an essential element of the crime, and in refutation of appellant's testimony?

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TABLE OF CASES

OTHER REFERENCES

* Cases or authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 16, 1963, Landora Bellamy died. Several hours later Halcott A. Bradley was arrested for killing her. By indictment filed on February 25, 1963, he was charged with first degree murder (22 D.C.C. § 2401). A mental examination at St. Elizabeths Hospital followed. After a trial by jury, spanning three weeks and including testimony from approximately fifty witnesses, appellant Bradley was convicted of second degree murder (22 D.C.C. § 2403). By judgement and commitment filed

on January 13, 1964, he was sentenced to a term of imprisonment from ten (10) to thirty (30) years. This appeal followed. (See Record.)

Shortly after seven p.m. on February 16, 1963, Landora Bellamy was found lying on the floor of her apartment at 922 Madison Street, Northwest (Tr. 63). Moments later she was dead (Tr. 93). An autopsy revealed three gunshot wounds to the body: one in the head, another at the back of the body behind the left shoulder, and the third at the right thigh. The wound to the head indicated that a bullet entered slightly above and behind the left ear and exited on the right side of the head above and in front of the right ear. This was the fatal wound. (Tr. 127-128).

The Government's Evidence of Appellant's Guilt

The Death of Landora Bellamy

At approximately seven p.m. on the evening of February 16, 1963, Lewis Bellamy, former husband of the deceased, went up the stairs to Landora Bellamy's second floor apartment. He knocked on the door and identified himself. (Tr. 389.) The sole response was the voice of his ex-wife exclaiming, "Help, Brad is in here and he has a gun (Tr. 391).[1]" Immediately, Lewis Bellamy tried to kick open the locked door; he was unsuccessful. Seconds later, while running down the stairs for assistance, he heard three gun shots. At the bottom of the stairs Bellamy knocked on an apartment door, had a brief conversation with the occupant, and then ran out of the building. First he went to a tavern, a block and a half away, but the public phone there was in use. Next door, at a laundromat, a call to the police was made. (Tr. 392-394.) Upon returning to the apartment building Bellamy saw the police entering, and he followed them back to Landora's apartment. At seeing the lifeless

[1] Landora Bellamy referred to Halcott Bradley as "Brad (Tr. 323)."

body of his former wife Bellamy went into uncontrollable grief and had to be restrained (Tr. 395). Aside from Landora Bellamy the apartment was empty (Tr. 64).

During the same period of time, Robert Johnson, who lived in the apartment directly above Landora Bellamy's, heard a woman screaming. The sound came from the apartment below. (Tr. 509.) Johnson stepped out of his apartment, saw nothing, went back in, and again heard a woman scream. This scream was immediately followed by someone kicking at a door. (Tr. 510.) Within five or ten seconds the retort of three gun shots reverberated through the building (Tr. 511). Johnson immediately left his apartment, went down the stairs, passed the victim's apartment, heard some notes struck on the piano, and went down to the first floor. While there, Johnson saw the door to Landora's apartment open. Halcott Bradley came out, looked about the corridor, looked down the stairs, and walked down to the first floor. Bradley, wearing no coat or hat, passed Johnson within a few inches. (Tr. 514.) His coat and hat were found in the apartment (Tr. 595-596). The coat contained a note from Bradley to Landora Bellamy, expressing his version of their differences, his causes for concern, and concluding, ". . . Why don't I give up and say to hell with you? I think you know why and why I am not going to do so until I get some answers, or we'll both rot in hell (Tr. 634-635)."

Prelude to the Death of Landora Bellamy

Halcott Bradley first met Landora Bellamy in a professional capacity, as an attorney advising her as to a divorce from Lewis Bellamy. That was July of 1961 (Tr. 350-351.) During the following months the relationship became less professional and more personal, growing intense and intimate, though punctuated with periods of argument and disagreement (Tr. 288-302, 324, 634-636). The final sequence of the liaison occurred in the period from February 6, 1963 until the death of Landora Bellamy and the arrest of Hallcott Bradley on February 16, 1963.

On the morning of February 6, 1963, general commotion emanated from the apartment of Landora Bellamy. Her screams pierced the quiet of the apartment building at 922 Madison St., Northwest. The sound of furniture being moved in the apartment provided a background cacophony. Landora left the building to get assistance, leaving appellant Bradley behind. He was locked out of the apartment and wearing only pajamas. Landora returned, accompanied by the police and her ex-husband, Lewis Bellamy, whose aid she had sought. All were let into the apartment, which was in total disarray, by Landora. Appellant was told to move out of the apartment, which he had, on occasion, been sharing with Landora. He was further asked to return the apartment keys; he denied having any such keys. While the police waited, appellant packed his belongings and was assisted in moving out. (Tr. 109-111; 117-120; 130-142; 359-363.)

Fright characterized Landora Bellamy's life from then until the day of her death. A new chain lock was installed on the door of the apartment (Tr. 302; 371). Daily telephonic contact was maintained with her former husband, though in the preceeding months she had called him very occasionally (Tr. 3980). Also, Lewis Bellamy, on Monday, February 11, called appellant and advised him to leave Landora alone. Bradley replied, "Well, it will all be over this weekend." (Tr. 382). On several nights Lewis Bellamy slept in the apartment on Madison Street to assuage Landora's fears (Tr. 460-461). Then Landora started sleeping at the apartment of Edna Henderson, a friend (Tr. 305-316, 325). At 6:30 p.m. on February 16 Landora left Edna Henderson's for a rendezvous with death (Tr. 315).

Throughout this period the assistance of the authorities was sought. On February 14, Landora and Lewis Bellamy went to the Corporation Counsel's Office to explain her fear of precipitate action by appellant. The Assistant Corporation Counsel who handled the matter was, ironically, a former classmate of appellant Bradley. Appellant

was called, advised that charges were being placed against him, and informed that Landora Bellamy stated that he tore her clothing and was afraid that Bradley would harm her. A hearing was set for the next day, February 15. A summons was sent to Bradley to appear at the hearing, and delivered to 3919 - 17th Street, Northeast, where appellant rented a room. "Robert Smith" told the officer that Halcott Bradley was not there and summons was returned unserved. "Robert Smith" was Halcott Bradley, who was merely avoiding the service of the summons. A later attempt to serve the summons failed because appellant was indeed not at the premises. Landora appeared for the hearing on February 15; appellant did not. The following day the assistance of the authorities was again sought and a disorderly warrant for appellant's arrest was issued, but service was not made. (Tr. 143-152, 154-162, 267-270, 383-384.)

On Friday, February 15, appellant started the chain of events which culminated in the death of Landora Bellamy. At approximately one-thirty p.m. appellant left his room at 3919 - 17th Street, Northeast. He rented a cab, at an hourly rate, and made four stops, including one at a liquor store. The final destination was the apartment building of Landora Bellamy, 922 Madison Street, Northwest. En route Bradley advised the cab driver that he was going to call on a young lady for whom he had just obtained a divorce and that he was having trouble with her. Arriving at the apartment building, appellant, who was then wearing a hat and coat, left the cab, entered the building, and had a brief conversation with the janitor. Shortly thereafter, at approximately two-thirty p.m., a locksmith arrived and met appellant, who was standing on the second floor. Appellant pointed to the door of Landora Bellamy's apartment, which had three locks; two were secured. The locksmith picked these open and left. (Tr. 163-175, 179-185, 190-197, 224-231.) Appellant was not seen at his residence on February 15 or the following day (Tr. 252-264). He

was not seen again until the following evening, after the death of Landora Bellamy.

Moments after the three shots were fired into Landora Bellamy's body on February 16, Halcott Bradley was seen leaving her apartment, looking up and down the hall, and then walking down the stairs. He was no longer wearing a hat and coat. Appellant passed within inches of Robert Johnson, who, because of the noise and shooting, was standing on the first floor. (Tr. 509-517).

Two of appellant's female acquaintances received telephone calls from him after seven p.m. Bradley called Constance P. Warren and advised her that he wanted to come where there was no noise. She advised him that her apartment was filled with family and friends and was quite noisy. (Tr. 526-527.) At approximately eight p.m. Bradley called Barbara Copeland. Twenty minutes later appellant arrived. Later, the police arrived and arrested Bradley. He informed the officers that he had arrived at Miss Copeland's at seven p.m. She contradicted him, saying that he had not arrived until after eight o'clock, a time fixed in her mind because of a television program. (Tr. 546-547.) Appellant was searched and a gun, not the murder weapon, was found on his person (Tr. 570-574). Other testimony showed that appellant had given Landora a revolver, on an earlier occasion; that weapon was not recovered (Tr. 578-579).

The Defense

Appellant's defense was two-fold: 1) that he did not commit the crime and 2) if he did kill Landora Bellamy it was the result of a mental disease and he was, therefore, not guilty by reason of insanity.

Appellant testified at great length, reviewing his entire life from the date of birth to the date of his arrest for murder. Bradley's education, business and professional activities, social life, and three marriages were all presented to the jury. (Tr. 661-996.) Appellant testified that on February 6, when he learned that Landora Bel-

lamy, whom he had been assisting from his own very hard pressed financial resources, had a bank account in excess of one thousand dollars, he had a blackout, the culmination of the tensions he experienced in his relationship with this woman. Bradley further testified that his recollections of the period from February 6 until he awoke in jail, following the death of Mrs. Bellamy, were fragmentary. (Tr. 806-808.) Numerous witnesses testified to Bradley's condition during the months preceding Landora Bellamy's death. The decline of his business and professional fortunes were also outlined, and psychiatric testimony was introduced.

Bradley, during direct examination, denied knowingly killing Landora Bellamy (Tr. 835). During cross-examination the prosecutor asked,

Q: Isn't it a fact that you left your house Friday afternoon with two guns in your possession, with the intent and purpose in your mind of either getting Landora to stay with you or to kill her?
A: No, that is not a fact.
Q: How do you know it is not a fact?
A: Because I have never in my life formed an intent to hurt, kill, molest, maim, injure, anybody, physically or otherwise at any time in my life. I have never formed an intent to do that.
Q: Haven't you ever lost your memory before?
A: I testified that the first time in my life of having a lapse occurred February 6, at about twelve-thirty a.m., the first time in my life.

* * * *

Q: You say that you never formed an intent to hurt, maim, injury (sic) anyone. Did you ever strike any of your three wives?
A: To strike or slap someone, Mr. Renne, does not result from the formation of an intent. It can be a reflex action, as like when Lan threw that whiskey in my face. You don't form—at least I don't form an intent to slap somebody.
Q: I now ask you the question: Did you ever strike any of your other three wives?

A: I think I slapped Mrs. Agnes Bradley once.
Q: Only once?
A: Yes.
Q: And no one else?
A: Not to my recollection.
Q: Could you have had a lapse of memory there?
A: My statement is that I don't have a lapse of memory about any period of my life, that I have always tried to remember my life in detail. I most often try to do so. (Tr. 986-987).

Mrs. Nancy Bradley, one of appellant's former wives, testified during rebuttal that she was slapped twice by appellant. One of the slaps required medical attention, the repair of her teeth by the dentist (Tr. 1330-1333). Appellant's only clear objection to this line of rebuttal questioning was based on the chronology: that the period about which Mrs. Nancy Bradley was questioned occurred prior to her marriage with appellant, whereas the question placed to Bradley was with regard to action taken against his wives. Other points of the defense were also rebutted.[2]

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[2] The prosecutor's closing argument covers seventy-three pages of the transcript. The prosecutor characterized his role as representing the people of the District of Columbia "(a)nd my other client, silent though she be, is Landora Bellamy, who throughout this trial has been villified. The defendant has tried to besmirch her name, her reputation, has tried to make her out to be some kind of a cold hard-hearted woman. When the evidence in this case is just to the contrary (Tr. 1582-1583)." Appellant argues that the one phrase which characterizes Landora Bellamy as a "client" of the prosecutor is grounds for reversible error (Br. 59). The prosecutor's closing argument was a model of temperate presentation of the facts coupled with proper advocacy. This one phrase, inaccurate in the strictest definition, is nevertheless quite proper as a symbolic characterization of the prosecutor's role. The utterance complained of, when viewed in context and in the light of the entire argument, was not calculated and designed to produce an improper conviction and did not in fact have that effect. *Isaacs* v. *United States*, 301 F.2d 706, 737 (8th Cir. 1962), *cert. denied*, 371 U.S. 818; *see*, *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 376, 185 F.2d 438, 440 (1950).

Under proper instructions the case was submitted to the jury which returned a verdict of guilty of second degree murder.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premediated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

SUMMARY OF THE ARGUMENT

At the end of the first day of trial, the court admonished the jurors not to discuss the trial or read or listen to reports concerning it. The jurors were reminded at intervals about this instruction. No requests for additional admonitions were made nor is any evidence presented that the jurors disregarded the court's instructions. The trial court, under these circumstances, did not err by not repeatedly reminding the jurors of their obligations.

Seconds before the deceased was shot by three bullets, she cried out for help to her former husband, who was outside at the door of her apartment, and named appellant as her assailant. Since an assault with a weapon was being committed against her, an inference easily drawn from the evidence, her outcry is admissible as a spontaneous exclamation, an exception to the hearsay rule.

As a rebuttal to appellant's testimony on direct examination that he did not knowingly kill the deceased and his later testimony that he had never formed the intent to injure anyone, testimony was presented that appellant had, on an occasion, injured one of his former wives. Appellant's only clear objection to this testimony was that Mrs. Nancy Bradley was not his wife when she was struck. New objections are now raised on appeal: that the rebuttal testimony was impeachment as to a collateral issue. Even assuming the point is preserved for review, the trial court properly exercised its discretion in allowing this testimony, dealing with an essential element of the crime, criminal intent, into evidence.

ARGUMENT

I. The District Court, at the outset, properly admonished the jurors to refrain from discussing or obtaining any outside information about the case, while the trial was in progress.

(Tr. 36, 37; 87, 178, 644, 1316, 1432;)

Before the jury separated, at the conclusion of the first day of trial, the District Court, at some length, admonished the jurors that at no time during the trial were they to discuss the case either among themselves or with outsiders.[1] They were also instructed to refrain

[1] THE COURT: Ladies and gentlemen of the jury, the opening statements in this case will not be made at this time, and you are to be excused until ten o'clock tomorrow morning.

But now that you have been sworn, as jurors in this particular case, that is any ten-minute recess, break, interruption in the

from reading or hearing what the news media might present with reference to the trial. (Tr. 37.) The jurors were on occasions throughout the trial reminded of these instructions (Tr. 87, 178, 644, 1316, 1432). At no time during trial, regardless of the duration of a particular recess, did appellant request additional instructions. Cf. Rule 30, Fed. R. Crim. P. Further, appellant did not move for a mistrial on the grounds that the trial court failed to admonish the jury continuously.

Neither during trial nor in his brief did appellant suggest that any of the jurors ignored the court's instructions; juries are presumed to follow instructions. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). In *Finley* v. *United States*, 271 F.2d 777 (5th Cir. 1959), *cert. denied*, 362 U.S. 979, the court characterized as frivolous an argument that the trial court committed reversible error by not repeating the instructions that newspaper articles were not to be read. Appellant, in the instant case, does dehors the record to show that some newspaper articles were published which dealt with the trial (Br. 56), yet no showing

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trial, noontime, any other time, please refrain from any comment even among yourselves as to the trial itself, or the subject matter, or the personalities involved. Just refrain from any comment.

Now the reason for that is that you may inadvertently, by express language or by implication, indicate to other jurors how you happen to be thinking during the progress of the trial.

Our objective, counsel on both sides and the Court's objective, is that each of you hear the testimony that will be presented in this case, evaluate it in your own mind, and then there will come that time when you will thoroughly discuss the matter among yourselves, and you can interchange your views at that time.

But during the course of the trial please refrain from any comment of any kind. Naturally you would not talk with any outsider or any outside party. In the event that any outside party talked with you, you would immediately report it to the Court.

Now in the event that there is any publicity through the news media, of television, radio or newspapers, please refrain from looking, listening or reading, during the progress of the trial. Keep an open mind until such time as all of the evidence has been introduced, at which time it will be your duty to dispose of this case.

Now you are excused at this time until ten o'clock tomorrow morning, back in this same courtroom. (Tr. 36.)

is made that the articles were in any way prejudicial. Compare, *Coppedge* v. *United States*, 106 U.S. App. D.C. 275, 272 F.2d 504 (1959). In any event, in the absence of proof that any member of the jury saw or heard the stories mentioned, failure to tell the jurors not to read newspapers or listen to the radio is not reversible error." *Ferrari* v. *United States*, 244 F.2d 132, (9th Cir. 1957) *cert. denied*, 355 U.S. 873; *United States* v. *Griffin*, 176 F.2d 727, 731 (3d Cir. 1949) *cert. denied*, 338 U.S. 952, *rehearing denied*, 339 U.S. 916. In the instant case the jury was admonished at the beginning of the trial and no evidence is present to show that the instructions were not followed. As Mr. Justice Holmes noted in *Holt* v. *United States*, 218 U.S. 245, 251 (1910),

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

See, *Adams* v. *United States ex rel McCann*, 317 U.S. 269, 281 (1942).

Nor do the cases of this Court hold, as appellant argues, that the jury must be admonished every time it separates, no matter how short the period, and that failure to do so constitutes plain error affecting substantial rights. In *Brown* v. *United States*, 69 App. D.C. 96, 99 F.2d 131 (1938), *cert. denied*, 305 U.S. 562, which was cited with approval in *Carter* v. *United States*, 102 U.S. App. D.C. 227, 231, 252 F.2d 608, 612 (1957) and in *Coppedge* v. *United States*, *supra*, this Court stated that "the court should invariably admonish (the jurors) not to communicate with any person or allow any person to communicate with them on any subjects connected with the trial, and not to read published accounts of the course of the trial." 69 App. D.C. at 99, 99 F.2d at 132. "Invariably admonish" does not mean that the instructions must be given repeatedly during trial and that failure to do is plain error. See Rule 52(b), Fed. R. Crim. P. This Court in *Brown*, finding no intimation or

showing of prejudice, held that no error existed even though no admonition was given when the jury separated during the course of the trial.

In *Carter* v. *United States*, *supra*, a capital case was reversed where the trial court failed to admonish the jury at the outset of the trial and just prior to an extended recess. Here the admonition was given at the conclusion of the first day of trial. In *Coppedge* v. *United States*, *supra*, highly prejudicial newspaper articles coupled with unusual activities in the courtroom were grounds for reversal. Further, the court did not, at the outset, admonish the jury to disregard or refrain from reading newspaper articles about the trial. The decision stated that after the articles appeared the trial court should have made a careful, individual examination of each of the jurors involved with reference as to whether they were affected by the newspaper articles. This indicates that under some circumstances such an investigation would even cure the failure of the court to admonish the jury at the beginning of the trial. None of these cases support the blanket rule which appellant advances: that where no prejudice is shown and absent any evidence that jurors violated the court's instructions to refrain from discussing or reading about the case outside the courtroom the mere failure of the court to admonish, repeatedly and *ad nauseam*, the jury not to discuss the case is reversible error. This position puts a premium on a cat and mouse technique, for the defense can sit back and wait for the court to omit such an instruction and then pounce forward to ask for a new trial. Such is not the law.

II. Landora Bellamy's final words constituted a "spontaneous exclamation," an exception to the hearsay rule, and were properly admitted into evidence

(See Tr. 391-395)

"Help, Brad is here and he has a gun (Tr. 391)" were the final recorded words of Landora Bellamy. At

that instant, Lewis Bellamy, her former husband, was at the door of her apartment, trying desperately to enter and assist her. He failed to kick the door down, and, second later, while running down the stairs for help, three shots ended Landora's life. (Tr. 391-395.)

Appellant argues that the final statement of Landora Bellamy was improperly admitted into evidence. He argues that the statement was hearsay and not subject to any of the exceptions allowing such testimony (Br. 54). Appellee suggests otherwise.

The final words of Landora Bellamy were properly admitted as an exception to the hearsay rule, a "spontaneous declaration." The true test for judging the admissibility of such a statement is "whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress and nervous excitement and shock produced by the act. . ." Wigmore, Vol. 6, § 1745 (3rd Ed. 1940). Even more aptly to the facts of this case, McCormick writes, "if . . . the declaration occurs while the startling event is still in progress, it is easy to find that excitement prompted the utterance."[1] The theory behind the admissibility of such statements is that in periods of excitement or shock the reflective tendencies of an individual are stilled and the utterance which occurs is "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." Wigmore, supra, § 1747(I).

Landora Bellamy was experiencing such a shock. An assault with a pistol was in progress; serious injury or death appeared imminent. Though no one actually saw the assault in the apartment, the evidence allowing such an inference shows the following taking place in the apartment in rapid succession: a woman screamed, Landora Bellamy cried out for help, and, within seconds, three gun shots were fired. Moments later, Halcott Brad-

[1] McCormick, Handbook of the Law of Evidence, Ch. 30, § 272, p. 580 (1954).

ley exits from the apartment, and Landora's body, life ebbing out of it, is found there. A startling event was certainly occurring when the exclamation was made. *Beausoliel* v. *United States*, 71 U.S. App. D.C. 111, 107 F.2d 292 (1939); *Guthrie* v. *United States*, 92 U.S. App. D.C. 361, 364, 207 F.2d 19, 22 (1953). Cf. *Brown* v. *United States*, 80 U.S. App. D.C. 270, 152 F.2d 138 (1945).

Nor does the fact that the shooting occurred within seconds *after* the statement was made affect admissibility. The most eloquent analysis of the admissibility of a statement made under the circumstances of Landora Bellamy's demise is found in *State* v. *Wagner*, 61 Maine 178, 196 (1873), which is quoted with approval in Wigmore, *supra*, at § 1745,

> "To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with an uplifted weapon when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections darked and dimmed by the mists and shadows of approaching dissolution would be, we think, but a bad sample of 'the perfection of human reason.'"

Landora Bellamy was dead, her voice stilled, only her ringing accusation has lived to haunt her murderer.

III. The Trial Court properly allowed rebuttal testimony on the issue of criminal intent, an essential element of the crime.

(Tr. 806-824; 835; Tr. 985; Tr. 1331; Tr. 1332-1334; Tr. 1348-1350)

On direct examination Halcott Bradley denied knowingly killing Landora Bellamy on February 16, 1963 (Tr. 835). A portion of his defense was predicated on establishing that during the period from February 6 until his arrest for the murder of Landora Bellamy appellant was

unaware of what he was doing. At some length he testified as to the blackout he suffered during that period. (Tr. 806-824.)

During cross-examination Bradley was asked if it were not a fact that he left his apartment on February 15 with two guns and the intent to kill Landora Bellamy. Appellant denied this, saying that it was not a fact, "[b]ecause I have never in my life formed an intent to hurt, kill, maim, injure, anybody, physically or otherwise at any time in my life. I have never formed an intent to do that (Tr. 985)." (See Counterstatement, supra.) Appellant's denial of the killing was based not only on his alleged failure to recall the events of that period but also on the grounds that he had never formed an intent to injure anyone. As a result of this testimony the prosecutor pursued appellant's testimony that he had not previously formed an intent and asked if Bradley had ever struck or injured any of his former wives. Appellant admitted striking only Mrs. Agnes Bradley and none of the others.

During rebuttal testimony the prosecutor presented the testimony of Mrs. Nancy Bradley who testified that on two occasions appellant had struck her, once causing physical injury which required medical attention to fix her dentures (Tr. 1332-1334; 1348-1350).

Apparently the main ground for objection to this line of rebuttal testimony was that appellant was only asked about whether he had struck any of his wives; Nancy Bradley was not, at the time she was struck by him, a wife. The court over-ruled the objection. (Tr. 1331, 1332, 1334.) Appellant now raises a new ground for objection: that the testimony of physical injury to Nancy Bradley was impeachment as to a collateral issue and thus improper rebuttal. Having failed to clearly object on this ground in the court below, appellant is foreclosed from raising the point on appellate review. See, *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Williams* v. *United States*, 113 U.S. App. D.C. 7, 9, 303 F.2d 772, 774 (1962), *cert. denied*, 369 U.S. 875;

Cf. *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), *cert. denied*, 374 U.S. 838.

Even assuming that the point was preserved for review on appeal, no ground for reversible error is present for the rebuttal testimony was properly admitted. Appellant denied killing Landora Bellamy and stated that he did not have the intent to injure her because he had never formed the intent to injure anyone. The rebuttal testimony, showing that appellant had struck a former wife with such force as to cause physical injury, was a direct refutation of appellant's contention and went to an essential element of the crime, criminal intent. Proof of an independent crime may be introduced to show the intent with which an alleged act was committed. *Copeland* v. *United States*, 80 U.S. App. D.C. 308, 152 F.2d 769 (1945), *cert. denied*, 328 U. S. 841; *Bracey* v. *United States*, 79 U.S. App. 23, 142 F.2d 85 (1944), *cert. denied*, 322 U.S. 762; see *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947); *Swann* v. *United States*, 195 F.2d 689 (4th Cir. 1952); Cf. *Martin* v. *United States*, 75 U.S. App. D.C. 399, 127 F.2d 865 (1942); *Burge* v. *United States*, 26 App. D.C. 524, 534 (1906). See generally, Wigmore, Evidence, Vol. I, § 216, 217 (3rd Ed. 1940). The trial court properly exercised its discretion in allowing the testimony on rebuttal as it went to the issue of intent, which was not a collateral matter.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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